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APPENDIX A

IN THE UNITED STATES DITRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 86-1066

FIKRY KHALIL, M.D.,
Plaintiff,

v.

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY-NEW JERSEY MEDICAL SCHOOL,
Defendant.

OPINION

April 13,1987

BEFORE
HONORABLE DICKINSON R. DEBEVOISE
UNITED STATES DISTRICT JUDGE
(No appearances)

Plaintiff, Fikry Khalil, M.D.,brought this action pro se on March 25,1986 against the University of Medicine and Dentistry of New Jersey ("UMDNJ")-New Jersey Medical School ("NJMS") alleging a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-5. On December 1,1986, former Judge Stern, to whom this case was originally assigned ,permitted plaintiff to amend his complaint to allege adue process violation under the Fourteenth Amendment to the United States Constitution and a violation

of 42 U.S.C. Section 1983. The defendant now moves for summary judgment on the grounds that (1) plaintiff has failed to establish the deprivation of any constitutionally protected liberty or property rights, and (2) plaintiff's Section 1983 claim is barred by the Eleventh Amendment to the United States Constitution. Because defendant has moved only as to the Title VII claim, I will treat defendant,'s motion as one for partial summary judgment pursuant to Fed. R.Civ.P. 56(d). Apparently, the defendant previouslymoved for summary judgment on the Title VII claim , but for some reason, there was never any disposition of that motion by Judge Stern. In any event, the only motin presently before me is the one dealing with plaintiff 's Section 1983 claim.

Jurisdiction is predicated

upon 28 U.S.C. Section 1331.

Statement of facts and Procedural Background

The facts are not in dispute. In August 1971 , plaintiff began his employment with the UMDNJ-NJMS as a post doctoral fellow. In 1974 he became an Instructor of Radiology . Then in 1975 plaintiff took a two-year unpaid leave of absence to teach at the University of Petroleum and Minerals in Saudi Arabia .

In 1977 plaintiff returned to the UMDNJ-NJMS and assumed the positio n of Assistant Professor of Radiology , without tenure , under a four-year contract . In 1978, he suffered a heart attack and in 1979 underwent open heart surgery . Plaintiff was subsequently reappointed as an Assistant Professor , without tenure , for an additional term

of three years, which was to expire in June of 1984.

On March 4, 1983, pursuant to the University Bylaws requiring that notification of non-renewal be given 12 months prior to the expiration of a three-year term, Dr, Vincent Lanzoni, Dean of the NJMS, inquired of Dr, Gilbert Melnick, Chairman of the Radiology Department, what action was recommended for plaintiff. See Affidavit of Katherine Suga, Esq., Appendix at 1a; Art. V, Title B, Section 3(e) of the University Bylaws, Appendix at 48a. On June 3,1983,Dr,Melnick advised Dean Lanzoni and the plaintiff that neither he nor the tenured members of the department recommended plaintiff for promotion to Associate Professor with tenure.On June 22,1983, plaintiff was officially notified that his employment at the University would terminate on June 30

1984.

In January 1984 plaintiff submitted his credentials for consideration for promotion to Associate Professor with tenure. This submittion was without the support of his department chairman, Dr. Melnick. On March 22,1984, plaintiff was informed in writing that the Faculty Committee on Appointments and promotions (the "FCAP")did not recommend him for promotion.Plaintiff appealed this decision, and on April 17,1984, the FCAP affirmed its decision. That decision was subsequently approved by the Board of Trustees.

On June 26,1984, plaintiff was proposed by his department chairman for a title change to Adjunct Assistant Professor for a one-year term, which he accepted. Plaintiff was subsequently reappointed to this position and remains

an Adjunct Assistant Professor to date.

On June 28,1984, pursuant to the collective bargaining agreement between the University and the Council of Chapters of the American Association of University Professors ("AAUP"), plaintiff filed a grievance challenging the University,s decision not to promote him. He alleged a failure by the University to include in his probationary period his service elsewhere, discrimination based on ethnic origin (Egyptian), age and physical handicap, and a refusal by the FCAP to consider two research papers in evaluating his promotion application. The Committee of Review denied his grievance in April,1985.

On January 4,1985 plaintiff filed a complaint with the Equal Employment Opportunity Commission("EEOC") alleging that the University,s failure to

promote him was due to his Egyptian national origin.

On January 4, 1985, plaintiff submitted his credentials to Dr. Melnick for consideration for promotion from his present position of Adjunct Assistant Professor to Associate Professor with tenure. Dr. Melnick, who did not recommend plaintiff for this promotion, then transmitted those credentials to the Dean.

In response, the Dean advised Dr. Melnick that plaintiff was not eligible for consideration for promotion. He explained that :

> As stated in the current Guide - lines for Appointment or Promotion, an individual who was not promoted prior to the expiration of a tenure track appointment may be given a one-year terminal adjunct appointment.

Affidavit of Katherine Suga, Appendix at 19a (emphasis in original).

On February 21, 1985 plaintiff filed a grievance concerning Dean Lanzoni, s refusal to transmit his application to the FCAP,which was denied by the Committee of Review on April 1 1985. On March 20,1985 plaintiff filed a complaint with the New Jersey Division of Civil Rights alleging discrimination based on national origin.

In April of 1985 the AAUP requested arbitration of plaintiff,s June 1984 and February 1985 grievances, except for the discrimination claim. An arbitration was conducted,at which time the June 1984 grievance was withdrawn. As to the remaining grievance, plaintiff called as a witness Dr. Sheldon Gertner, a former chairman of the FCAP , who testified that he knew of three Adjunct Assistant Professors who had been promoted to the position of Associate Professr . Unlike the plaintiff, all three had the

recommendation of their departmental chairperson. On October 21 , 1985 the Arbitrater ruled that the Dean's refusal to transmit plaintiff's papers to the FCAP in 1985 did not violate written University promotion procedures.

On January 17 , 1986, the EEOC issued plaintiff a Notice of Right to Sue. Plaintiff then filed this action on March 25, 1986.

Discussion

A. Eleventh Amendment Immunity

Plaintiff, who is now represented by counsel. alleges that pursuant to the University's own promotion policy, he was denied proper treatment in the promotion process and as such , was deprived of his liberty and property without due process of law. Defendant maintains , however, that it is immune from suit by virtue of the Eleventh Amendment.

The Eleventh Amendment Immunity of the UMDNJhas been considered on several occasions by members of this court, including myself. See Gena v. College of Medicine & Dentistry No. 83-3832 (D.N.J. February 15,1985) (Debevoise, J.); Maurielle v. University of Medicine & Dentistry, No. 83-1569 (D.N.J. August 10, 1984) (Lacey, J.) ,rev'd on other grounds 781 F.2d 46 (3d Cir.) , cert. denied, 107 S. Ct. 80 (1986); Cohen v. Board of Trustees of the UMDNJ, No. 85-3841(D.N.J. June 27, 1986) (Barry, J.) .In all three cases, it was held that the UMDNJ is not an alter ego of the State and thus not immune from suit under the Eleventh Amendment. See also Fuchilla v. Layman, No. A-3827-84T1 (N,J.App. Div. May 27,1986) (UMDNJ is autonomous and not an alter ego of the State); DeAngelis v. Addonizio,103 N.J. Super. 238, 249-54 (Law Div.1968) (New Jersey College of Medicine and

Dentistry is an independant and autonomous entity) .In the case at bar ,the UMDNJ has not presented any evidence that would justify reconsideration of this question. The basis for holding that the UMDNJ is not immune is fully discussed in these prior decisions and need not be repeated here. I conclude that the defendant's motion for summary judgment on this issue should be denied.

B. Plaintiff's Due Process Claim

1. Alleged Deprivation of a Property Interest

Plaintiff initially appeared to be claiming a deprivation of property based on the UMDNJ's failure to promote him to Associate Professor with tenure. However, in his brief in opposition, plaintiff expressly states that he" is not alleging that he was denied his due process rights because he was not promoted from the rank of Assistant Professor to

the rank of Associate Professor with tenure..." Plaintiff's Brief in Opposition at 1. Rather , plaintiff's claim is "that pursuant to Defendant's own policy he was denied the proper treatment in the promotion process." Id.

The University Bylaws provide that an Assistant Professor may be appointed for an initial term of 4 years and then may be reappointed for an additional term of 3 years. See Affidavit of Katherine Suga, Esq., Appendix at 47a, University Bylaws; Art. V, Title B, Section 1. If an Assistant Professor is promoted from within the rank of Associate Professor, tenure is conferred upon promotion. Id. The authority to promote to Associate Professor lies solely with the Board of Trustees. Id. at 60a, Art. V, Title F, Section 4.1.

Plaintiff states that on December 15 , 1983 he became totally

disabled and that his disability continued through June 30 , 1984 , which is the date on which he was terminated from his position as Assistant Professor. Plaintiff asserts that the University has a procedure which provides that if a faculty member has a catastrophic illness, that period of illness should not be counted as part of the seven-year probationary period. Plaintiff urges that the appropriate procedure is to place the faculty member in the non-tenure track position of Adjunct Professor for a sufficient time period so as to compensate for the gap in employment.

The plaintiff seeks " the opportunity to be placed in the tenure tract (sic) for the additional six months he lost as a result of his illness. " Plaintiff's Brief in Opposition at 1. He maintains that a denial of the

opportunity to complete his seven-year period is in violation of the NJMS Bylaws, more particularly Article III, Title E , Section 2.1. See Bylaws, Plaintiff's Brief in Opposition, Exhibit C, at IIIa.

Plaintiff bases this argument on a memorandum dated February 14 ,1986 from Norma Davenport, Esq., Associate Vice President of the UMDNJ , to Dr. Dennis Quinlan , President, Faculty organization. See Plaintiff's Exhibit A. The memorandum reads as follows:

> You have asked whether there is any accomodation available under the Bylaws for an individual who late in the tenure probationary period suffers a catastrophic illness or injury which creats a gap in employment. Although the Bylaws do not count leaves of absence against the probationary period, the concern you have raised is that in some cases an individual's research may suffer substantially from such a gap, and that the time remaining to the individual in his/her probationary period will be insufficient to allow development of a body of work which would support tenure.
>
> Based on review of the Bylaws and

> discussion with Bob D'Augustine, the Assistant Vice President for academic Affairs who works regularly with the appointments procedures and the Bylaws, it appears that such situations can be dealt with by moving the faculty member to an adjunct title for sufficient time to make up the deficiency caused by the gap and then to recommend promotion with tenure, if warranted under the standards and procedures of the appointments process.
>
> It would appear that no Bylaws amendment is necessary but that the NJMS Guidelines on moving individuals from adjunct to tenure track could be restated to allow for this situation.

Plaintiff's Amended Complaint, Exhibit 3.

The University poses several arguments to rebut plaintiff's claim. First, it asserts that while periods of unpaid sick leave and leaves of absence are not included in computing consecutive years of service, plaintiff never took an unpaid sick leave or leave of absence while an Assistant Professor; thus the University maintains, it properly computed his terms as Assistant Professor. See Affidavit of Katherine Suga, Esq., Appendix at 47a, 110a.

Second, the University points to the Affidavit of Robert D'Augustine, Assistant Vice President for Academic Affairs at the UMDNJ,which states that "(t)he procedure for moving a faculty member voluntarily from a tenure track position during the probationary period to the non-tenure track position is not mandated under the Bylaws of the (UMDNJ and NJMS).Although it is permitted , it is not routinely done." Plaintiff's Brief in Opposition,Exhibit B. Third, the UMDNJ argues that plaintiff never requested that he be moved to an adjunct title prior to the expiration of his appointment as Assistant Professor. Fourth, the University states that its decision to terminate plaintiff was made in June of 1983 , six months prior to the time plaintiff asserts that the probationary period should be tolled. Finally , the University submits that any possible error has been cured by making

plaintiff an adjunct professor: "Had plaintiff demonstrated that he merited tenure, his Chairman would have recommended him, as has been done with other Adjuncts." Defendant's Brief at 16.

Plaintiff asserts, however, that as long as he remains in his non-tenure track adjunct Assistant Professor position, he will never be able to apply for promotion to the rank of Associate Professor with tenure: "Only if the Plaintiff is permitted to go back to his former tenure tract (sic) Assistant Professor position will he be able to apply for a promotion to Associate Professor with tenure." Plaintiff's Brief in Opposition at 2.

The central question, therefore, is whether plaintiff has a constitutional right to placement in the tenure track position as Assistant Professor for an additional six months. In order to

determine whether an alleged deprivation of a property interest constitutes a denial of due process, a two-pronged inquiry must be made: First, whether there is a property interest in the due process sense , and second, what procedural protections must be afforded. Board of Rgents v. Roth, 408U.S.564, 569-70(1972).

The Supreme Court has described the property interest protected by procedural due process as follows:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Id. at 577. The Court noted further:

> Property interests, of course, are not created by the Constitution . Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independant source such as ststs law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits....

Id.As indicated by Judge Barry in Cohen v. Board of Trustees.

> It is well established that a state agency is bound by its own regulations, and violation of those regulations that infringes life, liberty,or property is an abuse of due process. Kelly v. Railroad Retirement Board,625F.2d 486(3d Cir.1980)....(T)he UMDNJ Bylaws, the NJMS Bylaws, and the Guidelines are issued under the explicit auspices of statute, N.J.S. 18 A: 64G-6(q). These Bylaws and Guidelines...thus also form a part of (plaintiff's) contract of employment. American Ass'n of Univ.Profs. v. Bloomfield College, 129 N.J. Super. 249(ch. Div.1974),aff'd,136 N.J. Super.442(App.Div.1975).

No.85-3841, slip op. at 28-29.

Upon reviewing the Bylaws, Guidelines and other materials submitted by the parties, I conclude that plaintiff has failed to establish a property interest in an additional six months in the tenure track position as Assistant Professor. The only evidence presented in support of his claim of entitlement is the memorandum from Associate Vice President Davenport,

which simply indicates that " the NJMS Guidelines on moving individuals from adjunct to tenure track could be restated to allow for this situation." Plaintiff's Amended Complaint , Exhibit 3. As the Bylaws and Guidelines presently stand, no procedure has been implemented by the UMDNJ-NJMS. The most that can be said is that the Guidelines may provide, in the future,for the procedure urged by plaintiff but that no such procedure presently exists. Robert D'Augustine, Assistant Vice President for Academic Affairs, has indicated that "(t)he procedure of moving a faculty member voluntarily from a tenure track position during the probationary period to the non-tenure track position is not mandated under the Bylaws.... Although it is permitted, it is not routinely done." Affidavit of Robert D'Augustine,Plaintiff's Brief in Opposition, Exhibit B. While this stat-

ment seems to suggest that this procedure may have been utilized at some point, since it is"permitted",plaintiff has failed to demonstrate that removal to a non-tenure track position is or was an established procedure creating a legitimate claim of entitlment.

Based on this conclusion,I need not address the numerous arguments put forth by the University with respect to this issue. However, several questions still remain.

It is unclear whether plaintiff has abandoned his claim that he has a constitutional right to promotion with tenure, which he originally raised in his Amended Complaint. To the extent that plaintiff has not abandoned this contention, I must conclude that he has no constitutionally protected property interest in being promoted with tenure. The Supreme Court's decision in Board of

Regent v. Roth is directly on point.

Roth was an Assistant Professor hired by Wisconsin State University for a fixed term of one academic year. He completed that term but was not rehired for the succeeding academic year. Under Wisconsin law, the decision whether to rehire a non-tenured teacher was within the discretion of the University. The Court found that there was nothing in Roth's appointment that secured any interest in reemployment or any possible claim of entitlement to reemployment. Nor was there any state statute or

University rule or policy creating such an interest. 408 U.S. at 578.

The same holds true here. As in Roth, there is no state law nor University policy, rule , or guideline that secures or creates a property interest in a tenured position. Plaintiff's assertion of

a property intrest reflects no more than his "abstract need or desire " for tenure. Id. at 577. Unlike the plaintiff in Cohen v. Board of Trustees, plaintiff has failed to establish nor has he even suggested that he was promised tenure or that he was being recommended for promotion with tenure. Hence , plaintiff has no constitutionally protected property interest in appointment to Associate Professor with tenure.

Next, it must be determined whether plaintiff was deprived of any constitutional rights when the Dean failed to submit plaintiff's credentials to the FCAP for consideration in 1985 , while plaintiff was an Adjunct Assistant Professor. The University notes that while the Guidelines allow for the self-submission of one's credentials for promotion, this provision is plainly limited to Instructors, Assistant

Professors or Associate Professors, which are all positions of full academic rank. See Affidavit of Katherine Suga , Esq., Appendix at 90a, NJMS Guidelines, Art.II, Section G. Adjunct Assistant Professor, on the other hand, is a position of qualified academic rank. Id. at 54a, University Bylaws, Art. V, Title F, Section1.2. The Guidelines make no provision for the self-submission of credentials by adjunct professors. This interpretation was upheld by the Arbitrator on October 21 , 1985.

The Arbitrator correctly determined that the Univsrsity did not violate any established procedure or policy when the Dean refused to submit plaintiff's credentials to the FCAP. Nothing in the Guidelines or Bylaws requires that the Dean submit an adjunct professor's credentials to the FCAP. While there have been instances in which

the Dean has submitted an adjunct's credentials to the FCAP, in those instances the applicant had the support and recommendation of his departmental chairperson. Again, as was true with regard to the tenure issue , while plaintiff may have desired that the Dean pass plaintiff's credentials on to the FCAP, he has failed to demonstrate any University rule or policy creating an entitlement to such a procedure, Thus, he had no property interest protected by the Fourteenth Amendment.

2.Alleged Deprivation of a Liberty Interest

In addition to claiming a deprivation of a property interest, plaintiff also claims a deprivation of a liberty interest. The liberty protected by the due process clause of the Fourteenth Amendment encompasses an individual's freedom to work and earn a living.

Bollow v. Federal Reserve Bank of San Francisco,650 F.2d 1093, 1100 (9th Cir. 1981), cert. denied, 455 U.S.948(1982). Liberty interests are implicated when an individual is discharged , or rehire refused, for reasons which are sufficiently "stigmatizing" that they seriously damage his standing in the community or significantly foreclose his freedom to take advantage of other employment opportunities. Board of Regents v. Roth, 408 U.S. at 573-74. Furthermore, the stigmatizing reasons must also be publicly disclosed. Bishop v. Wood, 426 U.S.341 (1976). In Bishop, the Supreme Court rejected a claim that mere dismissal was sufficient to constitute a deprivation of a liberty interest.

> In Board of regents v. Roth,408 U.S.564,72 S. Ct.2701,33L.Ed2d548, we recognized that the non-retention of an untenured college teacher might make him somewhat less attractive to other employers, but nevertheless concluded that it would stretch the concept too far

> "to suggest that a person is deprived of "liberty" when he simply is not rehired in one position but remains as free as before to seek another."
> ....This same conclusion applies to the discharge of a public employee when there is no disclosure of the reasons for the discharge.

Id. at 348.

Here , plaintiff has not alleged any public disclosure of the reasons for his failure to receive tenure. Unpublicized accusations do not infringe constitutional liberty interests because, by definition, they cannot harm good name or reputation. Haimowitz v. University of Nevada, 579 F.2d 526,529 (9th Cir. 1978); Bollow, 650 F.2d at 1101. The embarrassment and reflection on professional competence that usually accompany a denial of tenure and subsequent termination are not sufficient to implicate a liberty interest. Davis v. Oregon State University, 591 F.2d 493,498 (9th Cir. 1979); Board of Regents v. Roth, 408 U.S. at 574 n.13. Hence,

plaintiff has not been the subject of a stigmatizing charge that might seriously damage his standing in his community and thus has stated no claim under Section 1983 based on a violation of a liberty interest.

Conclusion

The defendant's motion for summary judgment on the ground that plaintiff has failed to establish the deprivation of a constitutionally protected property or liberty interest will be granted.

I will sign the order submitted by counsel for defendant, as modified.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 86-1066

FIKRY KHALIL, M.D.,
Plaintiff,

v.
UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY-NE
Defendant,

OPINION

May 26 , 1987

BEFORE
HONORABLE DICKINSON R. DEBEVOISE
UNITED STATES DISTRICT JUDGE

(No appearances.)

Plaintiff, Fikry Khalil , M.D., brought this action on March 25 , 1986 against the University of Medicine and Dentistry of New Jersey ("UMDNJ")-- New Jersey Medical School ("NJMS") alleging a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-5. Plaintiff was permitted to ammend his complaint to allege an additional claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and under

42 U.S.C. Section 1983.In a bench opinion dated April 13 , 1987 , I granted the defendant's motion for summary judgment on plaintiff's constitutional claim. Defendant now moves for summary judgment on plaintiff's Title VII claim. The facts of this case are fully developed in my prior bench opinion and are incorporated here by reference.

Discussion

The defendant sets forth two arguments in support of its summary judgment motion: (1)plaintiff's claim that his employment was terminated for discriminatory reasons is barred by the statute of limitations; and (2) defendant has articulated legitimate, non-discriminatory business reasons for its failure to recommend plaintiff's promotion and to submit plaintiff's credentials for consideration, and plaintiff will be unable

to demonstrate that defendant's reasons are pretextual. I address each claim in turn.

Statute of Limitations

Pursuant to Title VII, 42 U.S.C. Section 2000e-5(e), a charge filed with the Equal Employment Opportunity commission ("EEOC")

> shall be filed within one hundred and eighty days after the alleged unlawful employment practice occured..., except that in a case of an unlawful employment practice with respect to which the person aggreived has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice..., such charge shall be filed by or on behalf of the person aggreived within three hundred days after the alleged unlawful employment practice occured, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier ....

Here, plaintiff filed a charge with the EEOC on January 4, 1985, alleging that he was denied promotion to the tenured position of Associate Professor based on

his ethnic origin, which is Egyptian. On March 20, 1985, he filed a complaint with the New Jersey Division on Civil Rights. Although plaintiff's charge was not "initially instituted" with the State agency but instead, with the EEOC, he is nevertheless entitled to the longer 300-day limitations period. This conclusion is based on applicable case law and federal regulations.

In Mohasco Corp. v. Silver, 447 U.S. 807 (1982), the aggreived party filed his claim with the EEOC 291 days after the alleged discrimination occured. When the claimant filed his complaint with the EEOC no state claim had been filed. However, the EEOC immediately forwarded his letter to the State agency. The Supreme Court applied the 300-day exception to the 180-day rule since the EEOC did not consider the charge but rather, sent it immediately to the state agency, to afford that agency

an opportunity to consider the charge. As the Court concluded , "Since the EEOC could not proceed until either state proceedings had ended or 60 days had passed, the proceedings were ' initially instituted with a State ... agency' prior to their official institution with the EEOC. Therefore, respondent came within Section 706(e)'s exception allowing a federal filing more than 180 days after the occurance." Id. at 816-17. In so holding, the Court observed that the purpose behind the extended 300-day period is to give those States having agencies that consider discrimination claims an opportunity to redress the evil at which the federal legislation was aimed. Id. at 821.

As noted in Kocian v. Getty Refining & Marketing Co., 707 F.2d 748, 752 n.4 (3d Cir.), cert. denied, 464 U.S. 862 (1983), the EEOC amended its regulations subsequent to the Mohasco decision

to provide :

> Charges arising in jurisdictions having a (state deferral agency) but which charges are apparently untimely under the applicable state or local statute of limitations are filed with the Commission upon receipt.Such charges are timely filed if received by the Commission within 300 days from the date of the alleged violation. Copies of all such charges will be forwarded to the appropriate (state agency).

29 C.F.R. Section 1601.13(a) (3) (1987). As noted in the regulations, this provision was enacted to give full effect to the legislative purpose of Section 2000e-5, that is , to give the state agencies an opportunity to remedy the alleged discrimination prior to federal intervention. Id. Section 1601.13 (a)(4)(i).

In the case at bar,plaintiff resides in a jurisdiction having a state deferral agency under the regulations, i.e., the New Jersey Division on Civil Rights. It is unclear whether the EEOC forwarded plaintiff's charge to the State agency as required by the regulations. However, the EEOC was required to

do so. Hence ,plaintiff is entitled to the longer 300-day limitations period.[1]

The defendant contends, nevertheless, that plaintiff's claim is time-barred even under the longer limitations period. Defendant argues that although plaintiff's last day of employment as an Assistant Professor was June 30, 1984, under rhe rule announced in Delaware State College v. Ricks, 449 U.S. 250 (1980),the alleged discriminatory act occured on June 22,1983, the date plaintiff was officially notified that his employment would terminate on June 30, 1984.

In Ricks, the college's Tenure Committee recommended in February 1974 that a black professor not receive a

1.This case is distinguishable from Kocian, since the regulations were not yet in effect at the time the claimant in that case had filed his claim with the EEOC.707 F.2d at 752. Here, the regulations were in effect at the time plaintiff filed his charge.

tenured position. On March 13, 1974, the College Board of Trustees agreed with this recommendation and voted to deny tenure to Ricks. Ricks immediately filed a grievance with the Board's Grievance Committee. On June 26,1974, during the pendency of the grievance, the College offered Ricks a one year terminal contract that would expire on June 30 ,1975. Pursuant to the College's policy, upon the expiration of a terminal contract, the employment relationship ends. On September 12,1974, Ricks' grievance was denied.

In determining when the limitations period began to run with respect to the denial of tenure , the Supreme Court concluded that the limitations period commenced at the time the tenure decision was made and communicated to Ricks, even though one of the effects of the denial of tenure-- the loss of a teaching position-- did not occur until later. The Court

rejected the argument that the Board's decision in March 1974 to deny tenure did not become final until the Board denied Ricks' grievance, thus making September 12, 1974 the date tenure was denied. The Court found that the Board had made clear to Ricks far before September 12 that it had formally and officially denied him tenure and that "(t)he grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made." Id. at 261.

The defendant urges that these same principles should apply to the case at bar, since the June 22, 1983 letter from the Dean to plaintiff "officially inform(ed)" him, in accordance with the Bylaws, that his employment with the UMDNJ would terminate on June 30, 1984. Defendant's Appendix at 3a. Plaintiff argues, on the other hand, that it was not until he received the Board of Trustees'

letter approving his termination that he became aware of his potential termination. Plaintiff's Brief in Opposition at 2. However, defendant asserts that under the University Bylaws, the final authority to advise of non-renewal of employment rests with the Dean, and the Bylaws do not require final approval by the Board on non-renewals.Defendant's Brief at 12, citing University Bylaws, Art. II, Title B,Sections 1 and 2; Art.II,Title C , Sections 2 and 4; Art. V, Title F, Section 4.1;Art.VI,Title B, Section 1; Art.VII, Title C, Section 8; Art.V, Title B, Section 3. In support of this statement, defendant has submitted the affidavit of Robert D'Augustine , Staff to the Personnel Committee of the Board of Trustees, indicating that the Board's approval is not required for non-renewals. See Affidavit, annexed to plaintiff's

notice of motion for summary judgment. Plaintiff has presented no argument or evidence to refute defendant's assertion.

I conclude that the statute of limitations began to run from June 22,1983 when plaintiff received official notification that his employment was to be terminated. This is the date on which the decision not to promote him to the tenured position of Assistant Professor was made and communicated to him. As noted by the Supreme Court in Ricks.

> We recognize, of course, that the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes....But, for the reasons we have stated, there can be no claim here that Ricks was not abundantly forewarned. In NLRB v. Yeshiva University, 444 US 672,677, 63 L Ed2d 115, 100 S.Ct. 856(1980), we noted that university boards of trustees customarily rely on the professional expertise of the tenured faculty, particularly with respect to decisions about hiring, tenure,termination, and promotion. Thus, the action of the Board of Trustees on March 13,1974, affirming the faculty recommenda-

> tion, was entirely predictable. The Board's letter of June 26,1974, simply repeated to Ricks the Board's official position and acknowledged the pendency of the grievance through which Ricks hoped to persuade the Board to change that position.

449 U.S. at 262 n.16.

Moreover, the fact that plaintiff submitted his credentials for reconsideration does not serve to extend the limitations period. Although plaintiff seeks to phrase his complaint as alleging three seperate discriminatory acts-- his termination, the Faculty Committee's refusal in 1984 to recommend his promotion with tenure, and the Dean's refusal in 1985 to submit plaintiff's credentials for reconsideration-- they are all part and parcel of the defendant's decision not to promote him. As stated by the Supreme Court,

> We do not suggest that aspirants for academic tenure should ignore available opportunities to request recosideration. Mere requests to reconsider, however, cannot extend the limitations periods applicable to the civil rights laws.

Id. at 261 n.15. Furthermore, "(t)he existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made." Id. at 261.

It is impotant to note the court's caveat that where more than one act of discrimination is alleged, the general principles discussed in Ricks must be applied on a case-by-case basis. Id. at 257 n.9. Although it might be argued that plaintiff has set forth three separate claims of discrimination, the last occuring in 1985, as already noted, these claims are all based on the defendant's decision not to promote him with tenure and thus to terminate his position as Assistant Professor. Applying the "general principles discussed" in Ricks , I conclude that his claim of discrimination arose on the date he was officially notified that he would not be reappointed

to that position.

Conclusion:

Defendant's motion for summary judgment as to plaintiff's Title VII claim will be granted on the ground that the entire claim is barred by the statute of limitations.

Counsel for defendant is directed to submit a form of order consistent with this decision.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos.87-5309 & 87-5443

FIKRY L. KHALIL,
Appellant

v.

UNIVERSITY OF MEDICINE and
DENTISTRY OF NJ,NJ MEDICAL SCHOOL

Appeal from the United States District Court for the District of New Jersey-Newark.
(D.C. Civil Action No. 86-1066)
District Judge: Hon. Dickinson R. Debevoise.

Submitted Under Third Circuit Rule 12(6)
January 19, 1988
Before: HIGGINBOTHAM, SLOVITER and MARIS, Circuit Judges.

JUDGMENT ORDER

It is ORDERED that Appellee 's motion to suppress portions of the Appendix is GRANTED.

After consideration of all contentions

raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

_____
Circuit Judge

Attest:

_____
Sally Mrvos, Clerk

FEB 2,1988

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5309 and 87-5443

FIKRY L. KHALIL,
Appellant

v.

UNIVESITTY OF MEDICINE and
DENTISTRY OF NJ,NJ MEDICAL SCHOOL

(D.C. Civil No. 86-1066)

SUR PETITION FOR REHEARING

present: GIBBONS, Chief Judge,SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA and COWEN, Circuit Judges.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

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Circuit Judge

Dated: February 26, 1988